

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OLD STANDARD LIFE INSURANCE  
COMPANY, in Rehabilitation,

Plaintiff,

vs.

PACIFIC INSURANCE COMPANY  
LTD., a foreign insurer and  
member of the Hartford Group  
of Insurance Companies,

Defendant.

NO. CV-06-0239-EFS

**ORDER DENYING PLAINTIFF'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT AND  
RULING ON PLAINTIFF'S REQUEST FOR  
FINDINGS OF FACT**

On November 30, 2006, a hearing was held in the above-captioned matter. Bradley W. Hoff and John Ray Nelson appeared on behalf of Plaintiff Old Standard Life Insurance Company ("Old Standard") and Paul L. Kirkpatrick appeared on behalf of Defendant Pacific Insurance Company Ltd. ("Pacific"). Before the Court was Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 8). At oral argument, the Court requested supplemental briefing regarding Plaintiff's request for findings of fact pursuant to Federal Rule of Civil Procedure 56(d). After hearing oral argument and considering the submitted material, supplemental material, and relevant authority, the Court was fully informed. This Order serves to memorialize and supplement the Court's oral ruling denying the motion for summary judgment.

## **I. Summary and Background**

Plaintiff Old Standard's claim is based on the contention that Defendant Pacific owes Old Standard additional money under a commercial property insurance policy. Pacific issued policy ZG0029285 effective from May 2004, to May 2005, which covered two hotel properties owned by Old Standard. In September of 2004, Hurricanes Frances and Jeanne struck Florida causing extensive damage to the two properties. So far, Pacific has paid \$2,233,344.07 pursuant to the policy. Old Standard argues that based on the "Statements of Loss" prepared by Jeffery Higgins of CJW Associates ("CJW"), an independent adjuster, Pacific admits to owing Old Standard \$713,657.61 more than Pacific has thus far paid to cover the claims.

## **II. Summary Judgment Standard**

Summary judgment will be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). When considering a motion for summary judgment, a court may not weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue for trial exists only if "the evidence is such that a reasonable jury could return a verdict" for the party opposing summary judgment. *Id.* at 248. In other words, issues of fact are not material and do not preclude summary judgment unless they "might affect the outcome of the suit under

1 the governing law." *Id.* There is no genuine issue for trial if the  
2 evidence favoring the non-movant is "merely colorable" or "not  
3 significantly probative." *Id.* at 249.

4 If the party requesting summary judgment demonstrates the absence  
5 of a genuine material fact, the party opposing summary judgment "may not  
6 rest upon the mere allegations or denials of his pleading, but . . .  
7 must set forth specific facts showing that there is a genuine issue for  
8 trial" or judgment may be granted as a matter of law. *Anderson*, 477 U.S.  
9 at 248. This requires the party opposing summary judgment to present or  
10 identify in the record evidence sufficient to establish the existence of  
11 any challenged element that is essential to that party's case and for  
12 which that party will bear the burden of proof at trial. *Celotex Corp.*  
13 *v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to contradict the  
14 moving party's facts with counter affidavits or other responsive  
15 materials may result in the entry of summary judgment if the party  
16 requesting summary judgment is otherwise entitled to judgment as a  
17 matter of law. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

### 18 **III. Old Standard's Motion for Summary Judgment**

19 Old Standard argues that the Statements of Loss prepared by CJW  
20 constitute admissions by Pacific of amounts owed to Old Standard. In  
21 support of this contention, Old Standard argues that CJW is an agent of  
22 Pacific, and statements by an agent of an insurer are binding on the  
23 insurer. Old Standard cites to Florida Administrative Code 69B-166.024,  
24 which states:

25 Every insurer shall adopt and implement standards for the  
26 acknowledgment of communications and investigation of claims  
27 with respect to claims so that:

1 (1) Upon the insurer's receiving a communication with respect  
2 to a claim, it shall, within 14 calendar days, review and  
3 acknowledge receipt of such communication unless payment is  
4 made within that period of time or unless the failure to  
5 acknowledge is caused by factors beyond the control of the  
6 insurer which reasonably prevent such acknowledgment . . . A  
7 communication made to or by an agent of an insurer with  
8 respect to a claim shall constitute communication made to or  
9 by an agent of an insurer. As used in this subsection,  
10 "agent" means any person to whom an insurer has granted  
11 authority or responsibility to receive or make such  
12 communications with respect to claims on behalf of the  
13 insurer.

14 While CJW fits within the above definition of agent, this provision  
15 applies specifically to the acknowledgment of receipt of communications  
16 regarding claims. Thus, CJW's acknowledgment of Old Standard's proofs  
17 of loss satisfy the requirements dictated by this provision with regard  
18 to Pacific's acknowledgment of receipt of those proofs of loss.  
19 However, this provision does not stand for the proposition that CJW acts  
20 as Pacific's agent for all aspects of claim settlement or that any  
21 communication by CJW constitutes a communication by Pacific.

22 Out of context, the sentence, "[a] communication made to or by an  
23 agent of an insurer with respect to a claim shall constitute  
24 communication made to or by an agent of an insurer," would permit agents  
25 of an insurer to bind the insurer to changes in policy language or  
26 global settlements. However, read in the context of the administrative  
27 code, the provision is limited to acknowledgment of communications and  
28 responses to claims.

Whether CJW had the authority to bind Pacific with regard to  
settlement amounts is determined not by the existence of the agency  
relationship described above, but by CJW's apparent authority to so bind  
Pacific. While Old Standard points to Florida case law suggesting that

1 adjusters assume broad authority, none of the cases cited by Old  
2 Standard address situations in which the adjuster was an independent  
3 entity. In *Old Republic Insurance Company v. Von Onweller Construction*  
4 *Company, Inc.*, 239 So.2d 503, (Fla. App. 1970), a case cited by Old  
5 Standard in its reply brief (Ct. Rec. 28 p. 7), the agency relationship  
6 between the adjuster and the insurer had been stipulated to by the  
7 parties. 239 So.2d at 504. Further, the court in *Old Republic*  
8 specifically limited the binding authority of adjusters noting, "[t]he  
9 acts of an adjuster *within the apparent scope of his authority* are  
10 binding on the company without notice to the insured of limitations on  
11 his powers." *Id.* (emphasis added). Thus, those acts that are not  
12 within the apparent authority of the adjuster do not bind the insurer.

13 Here, Old Standard does not contend that it was unaware of CJW's  
14 status as an independent adjuster. Old Standard had no reason to infer  
15 that CJW had the authority to bind Pacific to specific loss amounts.  
16 The Statements of Loss themselves are a record prepared by CJW and do  
17 not contain language indicating an intent to bind Pacific or promising  
18 to pay Old Standard the amounts indicated. The letter accompanying the  
19 Statements of Loss advises Mr. Hoff to "review and contact me to  
20 discuss." (Ct. Rec. 12 Ex. 6 p. 89.) This statement does not indicate  
21 a promise to pay, but rather it indicates the loss amounts will be  
22 discussed further. For these reasons, Old Standard's Motion for Summary  
23 Judgment is denied.

#### 24 **IV. Old Standard's 56(d) Request**

25 In its reply brief, Old Standard requested that if the Court were  
26 to find that CJW lacked authority to bind Pacific, then the Court should  
27

1 make certain findings pursuant to Federal Rule of Civil Procedure 56(d)  
2 (Ct. Rec. 28 p. 11). Rule 56(d) states, "[i]f on motion under this rule  
3 judgment is not rendered upon the whole case or for all the relief asked  
4 and trial is necessary, the court . . . shall if practical ascertain  
5 what material facts exist without substantial controversy and what  
6 material facts are actually and in good faith controverted."  
7 Specifically, Old Standard requested findings that Pacific (1) has not  
8 appointed any representative to speak on its behalf about the value or  
9 amount of Old Standard's claim; (2) has not issued any written valuation  
10 of the claims; and (3) has not rejected or reserved the right to dispute  
11 the amounts set forth in Old Standard's Proofs of Loss.

12 With regard to Old Standard's first request, the Court does not  
13 find that Pacific has not appointed any representative to speak on its  
14 behalf about the value or amount of Old Standard's claim. The exhibits  
15 submitted by Old Standard attached to the Declaration of Bradley Hoff  
16 (Ct. Rec. 12) document a dialogue between Old Standard and CJW regarding  
17 the value of Old Standard's claims.

18 Old Standard's second request is a finding that Pacific has not  
19 issued a written valuation of Old Standard's claims. In its  
20 supplemental brief on this issue, Pacific argues that the checks issued  
21 to Old Standard constitute written valuations of the claim (Ct. Rec. 35  
22 pp. 4-5). However, in the letter that accompanied the most recent  
23 check, a letter dated June 2, 2006, from Gerald Albrecht and Michael  
24 Stein, counsel for Pacific, to Bradley Hoff, counsel for Old Standard,  
25 Pacific states, "[t]his amount is partial payment of the actual cash  
26 value of the loss to the structure for the West Palm Beach Inn. Pacific  
27

1 is continuing to analyze this claim and additional funding is being  
2 reviewed at this time." (Ct. Rec. 12 Ex. 8 p. 97.) Given this  
3 statement, and given Pacific's assertion that the Statements of Loss  
4 prepared by CJW do not constitute Pacific's valuations, as of November  
5 30, 2006, the date of oral argument on this motion, Pacific had not  
6 provided Old Standard with complete valuations of the losses.

7 Old Standard's third request is a finding that Pacific has not  
8 reserved the right to dispute the Proofs of Loss submitted by Old  
9 Standard. The Court finds that Pacific has reserved the right to  
10 dispute the loss amounts set forth in Old Standard's Proofs of Loss. In  
11 a letter dated December 20, 2005, from Jeffery Higgins, General Adjuster  
12 for CJW, to Bradley Hoff, counsel for Old Standard, Mr. Higgins states:

13 we expressly reject any and all statements contained in the  
14 said Proofs of Loss with reference to the amount of sound  
15 value and the amount of loss, and we expressly reserve all of  
16 our rights and defenses in connection with the ascertainment  
17 as to the value and loss, if any, and we do not in any way in  
acknowledging the receipt of the Proofs of Loss waive any of  
the rights and defenses which Pacific Insurance Company possesses  
under its policy number CG0029285.

18 (Ct. Rec. 12 Ex. 5 p. 85.) Old Standard argues that Mr. Higgins did not  
19 have authority to speak for Pacific with regard to the claims at issue.  
20 However, the Court finds Mr. Higgins did not have the authority to bind  
21 Pacific to set loss amounts, not that Mr. Higgins had no authority to  
22 speak to Old Standard about the claims. Therefore, the above quoted  
23 reservation of rights was a valid reservation of rights.

24 Accordingly, **IT IS ORDERED:**

25 1. Old Standard's Motion for Partial Summary Judgment on Pacific's  
26 Admitted Coverage Obligation (**Ct. Rec. 8**) is **DENIED**.

